Supreme Court, U.S.
FILED
JAN 20 2004
OFFICE OF THE CLERK

No. 03-5554

In the Supreme Court of the United States

LARRY D. HIIBEL,

Petitioner,

v.

THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT, ET AL.,

Respondents.

On Writ of Certiorari to the Supreme Court of Nevada

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF POLICE ORGANIZATIONS IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Amicus will address the following question:

Whether a statute that protects police officers by requiring that persons detained in *Terry* investigative stops provide officers with their names, and only their names, is reasonable under the Fourth Amendment, does not require providing incriminating evidence triggering the protection of the Fifth Amendment, and would not deter free speech in violation of the First Amendment.

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INTERESTS OF THE AMICUS CURIAE

The National Association of Police Organizations ("NAPO") is a coalition of police unions and associations from across the United States that serves to advance the interests of America's law enforcement officers through legal advocacy and political action.[1] NAPO was founded in 1978, and now represents 2,000 police unions and associations, 230,000 sworn law enforcement officers, 11,000 retired officers and more than 100,000 citizens who are committed to fair and effective crime control and law enforcement.

NAPO's police officer members put their lives on the line daily, in an effort to serve and protect American citizens. Whether as traffic officers, beat officers, or detectives, NAPO's members are in critical need of self-protective tools in order guard against the risks posed by *Terry* stops and effectively carry out their crime prevention mission.

SUMMARY OF THE ARGUMENT

Nevada's identification statute is carefully drawn to assist police officers in assessing the safety threat posed by detainees during constitutionally permissible *Terry* investigative stops. The Court has acknowledged time and again that officer safety is a weighty governmental interest, particularly in the Fourth Amendment context. Hundreds of officers have died in the past decade during such routine police tasks as traffic stops and field investigations. Law enforcement agencies have studied the criminal histories of those

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent are being filed with the Clerk of this Court. Pursuant to Rule 37.6 of the Rules of this Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amicus*, its members or its counsel, has made a monetary contribution to the preparation or submission of this brief.

responsible for such attacks, and have identified the leading indicators that a *Terry* detainee may assault an officer. Criminal justice experts have developed techniques to help police officers respond to these objective indicators of risk during field encounters. Knowledge of a detainee's identity and background provides officers with the ability to make potentially life-saving decisions that can be critical to protecting their safety. Nevada's statute allows officers to make these self-protective determinations.

Nevada's statute fits comfortably within the balance struck by the Court's Fourth Amendment precedents. These cases first weigh the State's interest in the challenged practice or rule, and then balance it against the individual's interests. When the safety of this country's police officers is at risk, even invasive measures infringing on personal privacy, such as pat-down frisks and automobile inventory searches, have been upheld as reasonable under Fourth Amendment principles. Nevada's requirement that detainees give their names is restricted to situations in which reasonable suspicion of criminal activity exists and is actually less personally invasive than the physical or vehicle searches upheld as acceptable measures to maintain officer safety. It is therefore reasonable under the Fourth Amendment.

Nor does Nevada's identification measure founder on Fifth Amendment grounds. First, the provision of such neutral information as a name is not the type of "testimonial" act typically subject to constitutional scrutiny. Officers are permitted to obtain fingerprints, voice exemplars and handwriting samples as identification tools because those measures do not independently reveal information relevant to a criminal investigation. A person's name is merely another method of identification, devoid of factual content, and should be placed on the same constitutional footing.

The Court has suggested that a name alone cannot be incriminating, and the Nevada Legislature specifically crafted the statute at issue to ensure that *Terry* detainees who comply with it need not answer additional questions that might elicit genuinely incriminating information. Moreover, it is highly unlikely that the information required by the Nevada statute – a bare name – will itself be a contested element of any offense if a criminal prosecution ensues. For all of these reasons, the statute does not even trigger Fifth Amendment protections.

Even if the Fifth Amendment did apply to the provision of identification required by the Nevada statute, however, that constitutional protection is far from absolute, and may give way to legitimate law enforcement goals. If the Fifth Amendment does not shield traffic violators or arrestees from giving their names, it should not shield those who have aroused police officers' suspicion sufficiently to permit their brief detention from doing the same.

Finally, the First Amendment interest in anonymous speech cited by Petitioner is not implicated by the Nevada statute. The Nevada statute at issue is distinguishable from anti-solicitation measures that have been held unconstitutional in that, unlike those statutes, it will not deter or discourage protected speech by requiring would-be speakers to divulge their names to the listeners they hope to sway. The Court has suggested that speakers may be required to identify themselves to government agencies after completing their protected anonymous speech; the Nevada statute requires no more.

In short, the Nevada statute is designed to further the government's legitimate interest in officer safety during *Terry* stops, and was drafted to ensure that it will yield no more than a name. This weighty interest is paramount in assessing the constitutionality of the statute, particularly because it imposes only minimal

burdens on *Terry* detainees. It intrudes only gently on citizens' personal privacy, does not compel incriminating testimony for use in a criminal case, and does not require individuals to forfeit their right to anonymous speech. Accordingly, the Nevada statute survives Fourth, Fifth and First Amendment scrutiny.

ARGUMENT

I. THE NEVADA STATUTE IS AN APPROPRIATE RESPONSE TO THREATS TO POLICE SAFETY DURING INVESTIGATIVE ENCOUNTERS.

A. *Police Officers Face The Constant Threat Of Attack By Detainees.*

Law enforcement officers put their lives at risk every time they go to work. Over the past decade, more than half a million officers have been assaulted on the job. U.S. Department of Justice, Federal Bureau of Investigation, *Law Enforcement Officers Killed and Assaulted*, 2002, at 76, at http://www.fbi.gov/ucr/killed/02leoka.pdf (visited Dec. 18, 2003). During that same period 636 officers have been slain in the line of duty. *Id.* at 10. In a 1997 study, almost three-quarters of Chicago police officers reported that they had been physically attacked, and 65 percent said they had been targeted with gunfire. Frank Main, *Cops Facing More Violence, Even As Overall Crime Drops*, CHI. SUN-TIMES, Aug. 27, 2001, at 5.

No officer is immune from the threat of violence. Police officers are killed at every time of the day, every day of the week, and every month of the year. *Law Enforcement Officers Killed and Assaulted*, 2002, *supra*, at Tables 2-4. Male, female, black, white, Asian and American Indian officers, young and old alike – all face the possibility of death because they wear a badge. *Id.* at Tables 5-6. This threat is not limited to obviously risky situations such as hot pursuit of drug

suspects or burglars. Even seemingly routine police work, performed by foot patrolmen and traffic officers, can be fatal. Of the more than 600 officers felled in the past decade, 105 were killed investigating suspicious people or circumstances in a *Terry*-type situation; another 98 were responding to a disturbance call involving a family quarrel or bar fight; and 97 were killed in traffic stops or pursuits. *Id.* at Table 18. Accordingly, interests in officer safety are hardly limited to shoot-outs and car chases; instead, they are very much implicated by brief, but personal, investigative encounters like the one in this case.

B. *Police Officers Can Minimize the Threat Posed by Detainees Using Identification Information.*

1. Law enforcement studies have identified the factors most often associated with attacks on police officers.

Law enforcement experts have long recognized that, when an officer conducts a field interview, his "greatest hazard is the unknown." Thomas F. Adams, *Field Interrogations*, POLICE, Mar.-Apr. 1963, at 26, 28. Consequently, "[w]hen an officer makes a stop, information about the stopped person's dangerousness or past violent activity can save the officer's life." U.S. Dep't of Justice, Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report*, 2001 Update (2001). For instance, one study found that over the fourteen-year period between 1980 and 1994, a stunning 72 percent of the individuals who killed police officers had been arrested at least once in the past. Roger G. Dunham & Geoffrey P. Alpert, CRITICAL ISSUES IN POLICING 600 (3d ed. 1997). Some 53 percent of those responsible for police killings had a prior criminal conviction. *Ibid.* And one-fourth of those individuals were on parole or probation at the time of the killing. *Ibid.* In the past decade, 528 of the 785 individuals known to be responsible for police deaths had a prior criminal

arrest. *Law Enforcement Officers Killed and Assaulted*, 2002, *supra*, at Table 42. This objective evidence linking past arrests and convictions to officer safety threats cannot be dismissed as "speculative," see Pet. Br. at 8. In light of these compelling statistics, it is no surprise that "[o]nce the [field interviewee] has been identified correctly, a large advantage lies with the * * * officer." David E. Zulawski & Douglas E. Wicklander, *Field Interviewing*, LAW AND ORDER 111, 114 (Sept. 1995).

While it is well settled that officers may protect themselves by conducting pat-down frisks for weapons during investigative stops, see *Terry* v. *Ohio*, 392 U.S. 1, 23-24 (1968), that sort of measure will not serve to eliminate dangers to officers conducting those stops. Statistics show that those who assault police officers may resort to hand-to-hand combat or use automobiles as battering rams during confrontations with police officers. Dunham & Alpert, *supra*, at 589. For instance, "[n]early all of the assaults on Wisconsin police officers in 2001 were committed by people using their hands, feet or other parts of their bodies." Tom Held, *Assaults on State Officers Increase for Second Year*, MILWAUKEE JOURNAL-SENTINEL, Dec. 3, 2002, at 1A. And police officers may be slain with their own firearms after a struggle with the assailant. Dunham & Alpert, *supra*, at 589. A pat-down search would do nothing to minimize such threats. Officers killed in these unarmed altercations would have been at least as well armed with information about their detainees as with the constitutional authorization to pat them down for guns.

2. Officers who know the names of their detainees can quickly assess whether they fit the profile of one likely to assault them.

For decades, a police officer has considered it standard protocol to "know the identity and character of as many persons in his district or beat as possible."

Adams, *supra*, at 26. Patrol officers are routinely advised during daily briefings of the name and description of potentially dangerous individuals they may encounter. But identification by sight recognition is an obviously limited tool; in particular, officers in metropolitan areas with large, transient populations cannot hope to recognize each and every dangerous detainee they encounter. And inferences drawn merely from non-factual cues, such as race, are obviously abhorrent.

Law enforcement agencies have long been refining the technological tools that can equip officers with potentially life-saving information about their detainees. As early as 1963, officers were advised that "[i]f the radio or a telephone is available, check with Records for the subject's record." Adams, *supra*, at 29. Today, law enforcement authorities have made sure that availability need not be an issue. Field officers can quickly (i.e. within the brief period of detention allowed by a *Terry* stop) use their own computers, or radio to their dispatcher, to access "comprehensive criminal history records" (known colloquially as "rap sheets"). These records reflect the subject's "current and past involvement with the criminal justice system * * * including arrests," the leading indicators of a propensity to assault police officers. *Use and Management of Criminal History Record Information*, *supra*, at 29. In some jurisdictions, police officers can now gain almost instantaneous access to such records by entering a detainee's name directly; the Los Angeles County Consolidated Criminal History Reporting System can retrieve information in less than 2.5 seconds. *Id.* at 66. "The majority of criminal justice inquiries to State repositories for criminal history record information are received on-line from remote computer terminals. * * * The remote terminal may be physically located in a police department [or, in] a growing number of jurisdictions, remote terminals have been installed in

individual police cars, giving police officers access to criminal history records in the field." *Id.* at 37. "Via [patrol car] computer, officers in the field have lightning-fast access to booking photos, arrest reports and other types of vital information that will allow them to determine if they're headed into a dangerous situation." Amy C. Rippel, *Laptops in Cop Cars*, ORLANDO SENTINEL, Jan. 9, 2003, at J1. The modern trend is toward "[p]ortable computers in patrol cars [that] enhance officer safety by giving them an information edge." The Evolution and Development of Police Technology: Technical Report for the National Institute of Justice 75 (July 1, 1998). This Court has acknowledged the fact that computer-equipped patrol cars conduct instantaneous searches of criminal history using only detainee names. *Arizona* v. *Evans*, 514 U.S. 1, 3 (1995) (noting that respondent was arrested when his name was entered into the patrol car computer after a traffic stop).[2]

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[2] The specter of inaccurate, unduly "intimate" data searches raised by amicus Electronic Privacy Information Center is without foundation. (EPIC Br. at 3). First, officials charged with maintaining computerized criminal history repositories are constrained by regulation and custom from including "investigative information" and "intelligence information" in their databases. U.S. Department of Justice, Bureau of Justice Statistics, *Use and Management of Criminal History Record Information: A Comprehensive Report, 2001 Update* (2001) at 29. Moreover, the rudimentary "name-only" searches available to police officers during a fleeting *Terry* stop will generally yield only the existence of prior convictions and arrests; more comprehensive data may take longer to generate. *Id.* at 24 (observing that the time frames for various types of searches may vary depending on the information and verification level required). Moreover, consistent with concerns expressed in *Evans*, 514 U.S. at 16-17 (O'Connor, J., concurring), law enforcement officers nationwide are striving to ensure the accuracy of their electronic criminal history information. See *Use and Management of Criminal History Record Information*, *supra*, at 50. For example, 35 states require their central information repository to conduct data quality audits in order to guard against the dissemination of inaccurate information. *Ibid.* Finally, "[e]ach state permits subjects to review their records and to institute procedures to correct errors." *Id.* at 48.

One "common denominator" found among victim officers is that they "did not perceive their attacker to be a serious threat until it was too late." Thomas D. Petrowski, *Use-of-Force Policies and Training*, F.B.I. LAW ENFORCEMENT BULLETIN, Oct. 1, 2002, at 25. Police officers who learn a detainee's name can literally forearm themselves with this information, altering their behavior toward the detainee if, say, the answer to their question is "John Dillinger" as opposed to "Dr. Billy Graham." Once made aware of an elevated threat, officers can elect where to stand in relation to the detainee in order to maximize their safety. See, *e.g.*, Charles Remsberg, THE TACTICAL EDGE 277-280 (1986) (diagramming the location of the "target zone," "crisis zone," "reach zone," and "point reflex zone" for officers conducting vehicle stops) (diagram attached hereto as Appendix, *infra*). They can decide whether to call for backup. *Id.* at 316. Officers who recognize that they are engaged in high-risk confrontations may elect to forego approaching the detainee or his vehicle in favor of ordering the detainee to walk towards the police car while shining a high-intensity light in his eyes to thwart possible attack. *Ibid.* In some circumstances, the officer might even choose to break off the encounter until safer circumstances arise.

The profound tactical advantage held by those who know the identity of their detainees is illustrated by the admission of one officer interviewed for an FBI probe into police killings. U.S. Department of Justice, Federal Bureau of Investigation, *In the Line of Fire: Violence Against Law Enforcement* 37 (1997). The officer was "surprised" to be assaulted during a routine traffic stop, but admitted that he had failed to radio to his dispatcher for information about the driver or his car. *Ibid.* Had he done so, he would have

learned that the car was stolen, and reports that he would "not [have] treated the offender in such a casual manner." *Ibid.* In short, knowledge of a detainee's history empowers police officers to protect their own lives during the course of a *Terry* stop while serving the public. The Nevada statute is a deft, minimally intrusive tool that enables police officers to make the right split-second tactical decisions when conducting constitutionally permissible field investigations.

II. THE NEVADA STATUTE FURTHERS AN ACKNOWLEDGED STATE INTEREST IN POLICE SAFETY WITHOUT UNDULY ENCROACHING ON DETAINEES' FOURTH AMENDMENT PRIVACY INTERESTS

A. *Nevada's Statute Is A Logical Outgrowth of the Authority Given to Police Officers in Terry.*

This Court recognized in *Terry* that police officers are entitled – indeed, obliged – to stop a citizen on the street if they suspect him of criminal behavior. 392 U.S. at 23. The Nevada statute codifies the *Terry* standard, authorizing an officer to demand a detainee's identity only if he has reasonable suspicion of criminal activity. The right to so intrude upon the freedom of movement and security of private citizens based on less than probable cause stems from the vital government interest in "effective crime prevention and detection." *Id.* at 22. Separate and apart from the intrusion justified by that generalized government interest, once a *Terry* stop begins, a "more immediate interest" is triggered; that "of the police officer in taking steps to assure himself" that the detainee poses no threat to him. *Id.* at 23.

This officer-safety interest justifies actions distinct from the investigatory stop itself. Even three decades ago, the Court recognized that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are

killed in the line of duty, and thousands more are wounded." *Terry*, 392 U.S. at 23. Acknowledging this grim reality, the Court approved one step to determine whether a detainee posed a threat – the pat-down frisk. Nevertheless, although the Court in *Terry* was specifically asked to approve only that specific measure, a broader interest in protective measures was recognized. "In view of [the perils to officers engaged in *Terry* stops], we cannot blind ourselves to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest," the Court concluded. *Id.* at 24; see also *id.* at 34 (Harlan, J., concurring) ("Once [a *Terry* stop is] justified * * * the officer's right to take *suitable measures* for his own safety follow[s] automatically") (emphasis added).

The Court has often recognized the importance of measures designed to enhance officer safety during field investigations. In *Adams* v. *Williams*, 407 U.S. 143, 146 (1972), the Court upheld an officer's right to reach through an open car door window and seize a revolver held by a detainee, based only upon an informant's tip that the detainee was armed. "[T]he policeman making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect," the Court observed. The authority to search and seize was justified, even in the absence of a warrant or probable cause, not because the officer wished to probe for evidence of a crime, "but to allow the officer to pursue his investigation without fear of violence." *Ibid.*

In short, this Court has for more than a quarter century acknowleged that, once the general government interest in crime prevention justifies the minimally intrusive measure of a *Terry* stop, a more urgent and specific government interest in officer safety permits additional, and more intrusive, actions

with regard to the detainee. The grim figures in the 2002 FBI *Law Enforcement Officers Killed and Assaulted* report illustrates that officers continue to be at risk today even though the protective measures authorized by *Terry* and *Adams* are available. Those cases authorized physical contact with the detainee to assess or foreclose the threat of an assault at a point in history when physical contact was virtually the only means of protecting officer safety.

The balancing of interests should reach the same result when officers seek to protect themselves with information, especially now that a mere name can generate critical information at lightning speed. The authority to require a person to identify himself is restricted under the Nevada statute to situations in which *Terry*'s reasonable suspicion test has been met, *i.e.*, situations where sufficient cause has been established to permit an officer to take a number of investigative actions. Enabled by such reasonable suspicions, officers will often need only obtain the name of a detainee in order to obtain access to a rap sheet reflecting past arrests and convictions – two key predictors of officer assault. Officers who know they are dealing with past arrestees can then take specific protective actions, such as calling for backup, moving to a less vulnerable position in relation to the detainee, shining a disabling light on the detainee, and keeping the gun-wielding hand free during questioning, in order to maximize their safety. Remsberg, *supra*, at 277-280, 316. If the state interest in police safety outweighed the detainee's right to be free of body-skimming pat-downs in *Terry* and the right to be let alone within the physical confines of one's car in *Adams*, surely it outweighs his interest in refusing to state his name to an officer.

In sum, the Nevada statute helps officers who initiate *Terry* stops to determine the threat posed by their detainee without touching them or reaching into

their personal space. Therefore, it is far less intrusive upon a citizen's right to be free from unreasonable searches and seizures than measures the Court has already held to be constitutionally permissible for the protection of our Nation's law enforcement officers.

B. *The Possibility That Officers Who Identify Detainees May Uncover Investigative Leads Is No Reason To Deprive Officers Of A Critical Safety Tool.*

Petitioner erroneously posits that the sole purpose of the Nevada statute is to unearth information for subsequent use in a criminal investigation. Pet. Br. at 20 ("the police would have little interest in asking persons their names or identities [unless the identity] lead[s] to incriminating evidence"). The Court should reject this crabbed perspective. In fact, the Nevada identification statute serves the two symbiotic purposes recognized in *Terry* – officer safety and crime investigation. As illustrated in Part II.A above, the Nevada statute is a minimally intrusive tool that goes a long way to achieving *Terry's* officer safety goal and is therefore a reasonable measure in the Fourth Amendment rubric. The possibility that the statute may also serve the second *Terry* goal, crime investigation, is a justification for its existence, not a flaw requiring its invalidation, as explained in Respondents' brief.

Terry stops are constitutionally permissible in large part because they are a useful investigative tool for police officers. "It may be the essence of good police work to adopt an intermediate response [when observing potentially criminal behavior]. A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time." *Adams*, 407 U.S. at 145-146 (citation omitted); see also *United States* v. *Brignoni-Ponce*, 422

U.S. 873, 881 (1975) (citing *Adams*, and concluding that officers who reasonably suspect drivers near the United States border of immigration violations may stop them and inquire into their citizenship and immigration status). One goal of *Terry* stops is to "prevent[] crime," *ibid.*, and police officers conducting them may find a clue in the detainee's name. The Court has repeatedly held that measures which simultaneously protect police officers and produce investigatory byproducts are not necessarily unconstitutional. In any event, it is highly unlikely that a detainee's name will generate useful investigatory leads in most cases.

1. Legitimate Officer Safety Measures Cannot Be Invalidated Merely Because they May Incidentally Unearth Evidence Relevant to Crime Prevention.

The Court has often concluded that legitimate officer safety measures like the Nevada statute do not become constitutionally offensive merely because they are capable of yielding investigative fruit. For instance, in *Colorado* v. *Bertine*, 479 U.S. 367 (1987), the Court affirmed a conviction based in part on evidence obtained during an inventory search of an arrestee's van. The officers in that case followed local police procedure requiring a detailed inspection of all impounded vehicles, and unearthed illegal drugs and cash used to prove several drug offenses, going well beyond the DUI charge for which the defendant was originally arrested. *Id.* at 369. The Court observed that the police department had established its inventory policy to achieve three goals, one of which was "protection of the police from dangerous instrumentalities," such as explosives or weapons the likes of which had been found in impounded cars in the past. *Id.* at 370. The Court concluded that the inventory search was conducted in accordance with that established policy, and was not conducted in bad

faith or "for the sole purpose of investigation." *Id.* at 372. Therefore, the legitimate governmental interests it served outweighed the individual's Fourth Amendment interests in the privacy of his car and its contents, even though the search led to admissible evidence. *Id.* at 374.

It is widely accepted that police officers conducting investigative detentions may seize, and prosecutors may use at trial, evidence found during the detention and frisk – even if the evidence supports a charge unrelated to the original justification for the stop. Indeed, in *Terry* itself, the detainee was stopped because the police officer suspected that he was preparing to commit a stick-up; the gun uncovered during the officer's lawful pat-down was later admitted into evidence to prove a concealed weapons charge. 392 U.S. at 6-7, 30-31. This Court concluded that because pat-down searches during a *Terry* detention were reasonable under the Fourth Amendment, "any weapons seized may properly be introduced in evidence against the person from whom they were taken." *Id.* at 31. The principle has been applied repeatedly. See, *e.g.*, *Illinois* v. *Wardlow*, 528 U.S. 119 (2000) (permitting introduction into evidence of gun seized during *Terry* stop justified by suspected drug trafficking); *United States* v. *Hensley*, 469 U.S. 221 (1985) (permitting introduction into evidence of gun seized during *Terry* stop justified by suspected bank robbery). And it has not been limited to weapons seized during detention. See, *e.g.*, *Minnesota* v. *Dickerson*, 508 U.S. 366 (1993) (permitting seizure and introduction into evidence of drugs uncovered during a lawful *Terry* pat-down); *Michigan* v. *Long*, 463 U.S. 1032 (1983) (permitting introduction into evidence of drugs found when officers conducting *Terry* stop to investigate car in ditch searched passenger compartment for weapons and obtained a plain view of drugs). Implicit in these cases is that investigative measures – whether authorized by statute or by judges

– that further the government interest in police officer safety are not constitutionally suspect merely because the discovery of other criminal conduct is a byproduct of their use, so long as proper cause is present. [3]

This principle applies squarely to the statute at issue herein. Nevada lawmakers concerned with the risks attendant to police field work sought to enable officers to protect themselves by determining the identity of those they confronted during *Terry* stops. In setting forth specific and cabined procedures permitting officers to do so, the Nevada legislature sought to bring regularity and uniformity to police field interviews, advancing the goal of officer safety while curtailing the prospect of overzealous *Terry* questioning. The legislature thus permitted officers to exercise the authority to require a person to provide his or her name only as part of an investigation founded on reasonable suspicion, essentially codifying the *Terry* standard. It also specified the single question that detainees must answer, and prescribed the precise penalty for refusal to cooperate. In addition, however, the statute places a strict 60-minute limit on the duration of *Terry* stops and bars officers from moving detainees without arresting them, Nev. Rev. Stat. 171.123(4). Most important, the statute expressly prohibits officers from seeking to compel detainees to divulge anything other than their identities. Nev. Rev. Stat. 171.123(3). In essence, this provision codifies the caution in *Berkemer* v. *McCarty*, 468 U.S. 420, 439-440 (1984) that detainees are "not obliged to respond" to officer questions "try[ing] to

[3] Indeed, the Court has repeatedly refused to bar the use of evidence discovered even as a result of genuinely pretextual investigative measures, so long as proper cause for those measures was present. See, *e.g.*, *Arkansas* v. *Sullivan*, 532 U.S. 769, 771-772 (2001) (*per curiam*); *Whren* v. *United States*, 517 U.S. 806, 813 (1996).

obtain information confirming or dispelling * * * suspicions."[4]

That the Nevada legislature was driven by the goal of officer safety is suggested by the manner in which the statute functions. Rather than simply creating an independent and free-standing rule, the Nevada legislature's restrictions on *Terry* stops function within the broader framework of prohibitions on interfering with or endangering police officers. Arrests or convictions for failing to comply with Nevada's identification statute will generally be premised on Nev. Rev. Stat. 199.280, which provides that any person who "willfully resists, delays or obstructs a public officer in discharging or attempting to discharge any legal duty of his office shall be punished." The foremost goal of Nev. Rev. Stat. 199.280 is to ensure that officers can perform their duties without fear of interference from combative or fleeing detainees. It provides for detainee punishment only as a means of ensuring officer safety, not as an investigative tool.

In short, the Nevada statute was narrowly crafted to serve the legitimate goal of protecting officers thrown into unpredictable situations on a daily basis while respecting the rights of citizen detainees. When the statute is enforced, police officers might from time to time come across information useful to the investigation of a possible crime. But this incidental

[4] Petitioner makes much of the Court's remark in *Berkemer* v. *McCarty*, 468 U.S. 420, 439-440 (1984), that police may not force citizens to participate in investigatory interviews. But *Berkemer*'s subtle language does not support the argument that detainees are immune from disclosing their identification. *Berkemer* authorizes two types of inquiries: those that "*determine* [detainee] identity" and those that "*try* to obtain information confirming or dispelling the officer's suspicions." *Ibid.* (emphasis added). This language suggests that police are entitled to know a detainee's identity but may learn additional information only if citizens voluntarily cooperate. It further suggests that the two inquiries are analytically distinct and carry independent weight.

effect is not the sole, or even the primary, purpose of the statute. Notably, pat-down frisks authorized under *Terry* often yield evidence of criminal activity independent of the basis for the stop, such as possession of illegal weapons or drugs. The Court in *Terry* did not see fit to expose police officers to possible assault in order to foreclose the possibility that pat-down searches would reveal potentially useful information. There is no more reason to do so in this case. If bodily and automobile inventory searches, which are far more invasive than the request for identification authorized by the Nevada statute, survive constitutional scrutiny, the Nevada statute cannot be said to unreasonably trespass upon individuals' Fourth Amendment rights.

2. Names are Not Ordinarily a Matter of Evidentiary Significance in Criminal Prosecutions.

As discussed above, the Court has affirmed convictions based upon physical evidence, such as drugs, cash, and stolen vehicles, uncovered during safety-driven measures. By contrast, it is highly unlikely that the safety-driven measure at issue in this case, required detainee identification, will often yield evidence admissible in a criminal trial. Therefore, the asserted invasion effected by the Nevada statute is inherently more reasonable even than practices the Court has already deemed constitutional.

Requiring detainees to identify themselves will hardly be as revealing as Petitioner suggests. Even the additional information an officer can retrieve using the name – the fact of prior arrests or outstanding warrants – is innocuous compared with the conclusive physical evidence this Court permits officers to uncover without a warrant when officer safety is at stake. As illustrated in Part I above, the criminal history records accessible during *Terry* stops are primarily lists of past arrests, convictions, and

outstanding warrants. The databases available to officers generally do not – and in some cases, by regulation, cannot – contain "investigative information" or "intelligence information." *Use and Management of Criminal History Record Information, supra*, at 29. To be sure, officers who access rap sheets may learn that a detainee is wanted on a warrant or that a detainee carrying a weapon is legally barred from doing so. This information may then independently influence an officer's decision to arrest a detainee – an intermediate step in the criminal justice system which may or may not lead to conviction. But a person's name, as distinct from their identity, is rarely an issue in a criminal case. Accordingly the Court need not depart from its settled course of approving officer safety measures in this case, where the citizen interest on the other side of the scale is so speculative.

III. THE FIFTH AMENDMENT DOES NOT SHIELD DETAINEES FROM IDENTIFYING THEMSELVES TO POLICE OFFICERS.

A. *Required Self-Identification During a Terry Stop Does Not Trigger Fifth Amendment Protections.*

The Fifth Amendment privilege against self-incrimination is applicable only in a narrow set of circumstances far removed from the facts of this case. Individuals can only assert the privilege against compelled testimonial or communicative statements that are incriminating, not against measures designed to identify them in the course of legal proceedings. Moreover, individuals can only assert the privilege to prevent the use of relevant statements in a criminal case. *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003). Because the Nevada statute is designed to elicit identity only, for use during the field stop itself, it does not trigger the protections of the Fifth Amendment.

1. The Fifth Amendment Applies To Communications, Not To The Provision of Identification Evidence.

The core purpose of the Fifth Amendment privilege is to "spare the accused from having to reveal * * * his knowledge of facts relating him to the offense or from having to share his thoughts and beliefs with the Government." *Doe* v. *United States*, 487 U.S. 201, 213 (1988). Accordingly, where law enforcement officers compel suspects to provide mere identifying information that does not intrude into "a private inner sanctum of individual feeling and thought," *Couch* v. *United States*, 409 U.S. 322, 327 (1973), the Court has given its approval.

The Court has on many occasions approved measures that compelled persons to provide evidence of their identity. The rule set forth in *Schmerber* v. *California*, 384 U.S. 757, 764 (1966) holds today: law enforcement officers seeking to learn a suspect's identity may compel them to provide "real or physical evidence" against themselves. Applying the *Schmerber* rule, this Court has found a battery of identification measures that elicit "real or physical evidence" to be beyond the purview of the Fifth Amendment. In one highly analogous instance the Court upheld a California statute compelling drivers involved in car accidents not merely to provide their names and addresses, but to stop at the scene of the accident to do so. *California* v. *Byers*, 402 U.S. 424, 433-434 (1971). The disclosure of name and address was held by a plurality of this Court to be "an essentially neutral act," not "testimonial in the Fifth Amendment sense." *Id.* at 431-432. The nontestimonial nature of the information compelled by the statute was sufficient to insulate it from Fifth Amendment scrutiny, whether or not the identification provided could be defined as incriminating.

Following the same reasoning, the Court has allowed police to obtain similarly "neutral" identifying evidence from suspects in several ways, some of which even involve compelled speech. They may extract blood samples from suspects and analyze their chemical composition. *Schmerber*, 384 U.S. at 765. Police may require suspects to submit handwriting exemplars where the purpose of the written material is to identify the suspect as the author of a previously existing piece of evidence, not to use the content of the exemplar as proof of a crime. *Gilbert* v. *California*, 388 U.S. 263, 266-267 (1967).[5] Nor is the spoken word an impassable boundary. Officers may force a defendant to appear in a lineup and recite particular words to determine whether witnesses may identify his voice. *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967). And they may compel suspects' voice exemplars for comparison with wiretap tapes to determine the identity of the taped speakers. *United States* v. *Dionisio*, 410 U.S. 1, 6-7 (1973). In each of these cases, police had evidence that a crime had already been committed, and the Court allowed them to force suspects to provide evidence identifying them as the perpetrator.

The Nevada statute is simply another entry in this familiar and approved arsenal of compelled identification evidence. Indeed, it is virtually indistinguishable from the identification requirement held to be non-testimonial in *Byers*. The statute permits law enforcement officers to determine the name of detainees, just as the voice exemplar in *Dionisio*, the compelled recitation in *Wade*, and the handwriting sample in *Gilbert* permitted officers to determine the identity of those under investigation.

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[5] Similarly, the Court has held that compelled handwriting exemplars do not violate the Fourth Amendment, so long as a preliminary showing of reasonableness is made. *United States* v. *Mara*, 410 U.S. 19, 22 (1973).

Accordingly it does not intrude on Fifth Amendment rights.

2. A Bare Name Is Not Incriminating Evidence Subject to the Protections of the Fifth Amendment.

Byers establishes that even if a name yields evidence against the detainee, its compelled provision is permissible under the Fifth Amendment. The Court acknowledged that providing a name following a traffic accident could lead to prosecution for an offense unrelated to the accident. 402 U.S. at 432. "Although identity, when made known, may lead to inquiry that in turn leads to arrest and charge, those developments depend on different factors and independent evidence." *Id.* at 434. "There is no constitutional right to * * * [evade an identification statute] in order to avoid the possibility of legal involvement." *Ibid.* Just as in *Byers*, a *Terry* detainee who provides his name faces the possibility that a prompt search of police records will result in an arrest or charge for an offense unrelated to the original justification for the stop. That possibility is insufficient to trigger Fifth Amendment protection.

In short, a name-generated rap sheet is far less directly incriminating, in and of itself, than measures such as the line-up identification that resulted from the compelled speech in *Wade*, the blood test in *Schmerber*, or the wiretap identification that resulted from the compelled voice exemplar in *Dionisio*. In each of those cases, the procedure compelled the production of substantive evidence that was a critical evidentiary link between the crime and the defendant. The information gleaned from the Nevada statute, by contrast, may ensnare a detainee already wanted by police for criminal wrongdoing, but it will not itself provide evidence and will only result in the obtaining of proof as a consequence of "different factors and independent evidence," *Byers*, 402 U.S. at 434. The

Court made it clear in *Byers* that statutes requiring only the "neutral" act of self-identification are not rendered unconstitutional simply because identification may lead to "collateral consequences." *Id.* at 432.

As a practical matter, the circumstances in which a person's mere name, as distinct from his or her identity, will itself be evidence of criminal behavior are actually few and far between. The crime of identity theft may conceivably turn on the *use* of a particular name, but not on any fact other than that the perpetrator is not really the person whose name was used. Similarly, forms of fraud involving impersonation may turn on one's *identity* being different from a false identity used in the fraudulent scheme, but the person's *actual* name will make no difference. Even domestic battery, the offense under investigation during the *Terry* stop in the instant case, cannot be proven on the basis of a name. Those who share the same name, whether by coincidence or in-law relationship, may not be involved in the type of relationship covered by the domestic violence laws, while those with different last names, such as stepparents, live-in partners, or even married persons who do not choose to take each others' names, may participate in intimate relationships with the alleged victims of their domestic abuse.

B. *The Fifth Amendment Privilege Is Not Absolute, and May Give Way In Circumstances Such as Those Implicated by the Nevada Statute.*

The Fifth Amendment protection against self-incrimination is far from absolute; it must yield to some of the logistical imperatives of routine police work. This Court has long recognized that law enforcement officers must elicit some limited, neutral information from detainees and suspects in order to fulfill basic functions. Thus, for example, police are entitled to secure routine biographical information

during the booking process in order to keep accurate records, because that information has been deemed "reasonably related to the police's administrative concerns." *Pennsylvania* v. *Muniz*, 496 U.S. 582, 601-602 (1990). Similarly, officers are entitled to request identification from traffic offenders, even though that request may compel offenders to reveal information that independently leads to other charges. See, *e.g.*, *Byers*, 402 U.S. at 434.

Notably, just one Term ago, the Court declined to define a "criminal case" as commencing with police interrogations at the outset of the investigatory process. *Chavez* v. *Martinez*, 123 S. Ct. 1994 (2003). Thus, police questioning that does not result in the initiation of legal proceedings need not withstand Fifth Amendment scrutiny. Even if police questioning leads to the initiation of criminal proceedings, the responses to those questions are not subject to the Fifth Amendment if they are not used in court. *Id.* at 2000-2001. Of course, the majority of *Terry* detainees who give their names will never be arrested, never be charged with a crime, and never be prosecuted in a criminal case. In the lion's share of these cases, therefore, the Fifth Amendment will never come into play. Even those detainees who are arrested on the basis of information learned via a computerized name search will have revealed no more than what is constitutionally permissible at the booking stage. It is hard to see how the same information divulged when criminal charges are imminent is subject to a lesser Fifth Amendment standard than information divulged when criminal charges are inchoate

The Nevada statute permits officers to request just the type of identifying information the Court has already held to be immune from the Fifth Amendment when reasonably designed to further a legitimate law enforcement goal. The authority, and even duty, of an officer to conduct a *Terry* stop, and investigation, 392

U.S. at 23, is a necessary and proper part of a police officer's duties, and ensuring that it is conducted safely represents a legitimate law enforcement need independent of any desire to gather evidence. The provision of identification during a *Terry* stop, like the provision of detailed biographical information during the booking process, serves a critical law enforcement need. It does so without requiring detainees to forfeit their private thoughts, motives, or beliefs in contravention of the Fifth Amendment.

IV. THE NEVADA STATUTE POSES NO THREAT TO FREE SPEECH INTERESTS PROTECTED BY THE FIRST AMENDMENT.

Petitioner misses the mark in asserting that the Nevada identification statute treads on First Amendment interests in anonymous speech. Pet. Br. at 37-39. The Court has explicitly stated that a speaker's interest in anonymity is strongest when the speaker is engaged in "one-on-one communication" with his intended listener. *Buckley* v. *American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 199 (1999). This interest in anonymity was sufficient to invalidate a statute requiring petition circulators from wearing name badges while soliciting signatures during the type of door-to-door outings alluded to by Petitioner. *Id.* at 200. In contrast, a provision of the statute requiring circulators to reveal their identities in affidavits submitted to government agencies after the solicitation was concluded, which were not instantly accessible to potential listeners, was suggested to be inoffensive to free speech. *Id.* at 198-199. The statute invalidated in *Watchtower Bible & Tract Society of New York, Inc.* v. *Village of Stratton*. 536 U.S. 150, 166-167 (2002), was arguably less respectful of speakers' anonymity than the *Buckley* statute in part because it required speakers to register as door-to-door canvassers on a list available to the public at large, prior to contacting listeners.

Petitioner's reliance on First Amendment principles misses their point. The Court in those cases sought to prevent measures that would deter or discourage free speech, not to protect the identities of speakers identities from any legitimate disclosure. That principle has no relevance to this case, which involves a statute that requires providing one's name to a police officer conducting a criminal investigation supported by reasonable suspicion. Those cases protect the speaker's anonymity from his potential audience, not from proper regulatory authorities such as police departments. Because the Nevada statute does not force individuals exercising their First Amendment rights to divulge their identity to substantive listeners or threaten to silence them from expressing their views, it does not offend any of the First Amendment rights recognized in *Watchtower*, as Petitioner urges.

CONCLUSION

For the foregoing reasons, as well as those set forth in Respondent's brief, the Court should affirm the judgment of the Nevada Supreme Court.

Respectfully submitted.

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JANUARY 2004

APPENDIX

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